83-1628

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

• • •

DR. HERBERT M. SHELTON, ET AL,
Petitioners,

VS.

JOAN F. CARLTON, ET AL,
Respondents.

• • •

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

• • •

THOMAS GOGGAN
416 Littlefield Building
Austin, Texas 78701
Counsel of Record

April 2, 1984

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

• • •

DR. HERBERT M. SHELTON, ET AL,
Petitioners,

VS.

JOAN F. CARLTON, ET AL,
Respondents

• • •

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

• • •

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Dr. Herbert M. Shelton and Dr. Vivian V. Vetrano pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit *722 F. 2d 203* filed in the above-entitled case on January 3, 1984.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in apparently holding that a person is not entitled to choose a course of treatment not sanctioned by orthodox medical opinion?

2. Did the Court of Appeals err in apparently holding that practitioners are not entitled to engage in a course of treatment not sanctioned by orthodox medical opinion?

3. Did the Court of Appeals err in apparently holding that Dr. Vetrano recommended an extended fast for the treatment of decedent's ulcerative colitis?

4. Did the Court of Appeals err in effectively holding that the defendants should be held to the standard of care of medical practitioners?

5. Did the Court of Appeals err in apparently holding that the evidence is sufficient to support the verdict and judgment of negligence, both ordinary and gross?

6. Did the Court of Appeals err in apparently holding that the Federal Rules of Evidence permit the admission of unrelated prior accidents in a negligence case?

PARTIES BEFORE THE FIFTH CIRCUIT

The parties to the proceeding in the Fifth Circuit were the following:

Dr. Herbert M. Shelton

Dr. Vivian V. Vetrano

Joan F. Carlton, Individually and as representative of the Estate of William R. Carlton, Deceased and as next friend of Robert Carlton, Melissa Carlton, David Carlton and Lynn Carlton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The District Court Judgment is included herein as Appendix A-1 *infra*. The Fifth Circuit Opinion is included herein as Appendix B, *infra*, and is reported at *722 F. 2d 203.*

JURISDICTION

The Judgment of the Fifth Circuit was filed on January 3, 1984. The jurisdiction of this Court is invoked under *28 USC §1254 (1)*. The basis of jurisdiction in the District Court was *28 USC §1332(a)*.

FEDERAL RULES INVOLVED:

Rule 403, Federal Rules of Evidence:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404(b), Federal Rules of Evidence:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

PRELIMINARY STATEMENT

This is an action for wrongful death. This case presents novel and important questions concerning the freedom of individuals to choose health care procedures which are not recognized by the medical establishment and the liability of those persons and institutions who

provide such alternative procedures to individuals who choose them contrary to the advice of physicians.

The decedent in this case chose to undergo alternative treatment in spite of medical advice to the contrary.

The fundamental issue presented in this case is that of effective freedom of choice, the freedom to probe beyond the assumptions sanctified by time and the acceptance of mainstream medical opinion.

It must be noted at the threshold that this litigation does not involve such questions as whether or not parents should be permitted to subject their minor children to unorthodox beliefs and practices, such as refusal of blood transfusions. The decedent in this case was an intelligent, educated adult, who made his decision based upon independent research and investigation.

STATEMENT

Plaintiff was the wife of the decedent, William Carlton (TR 1-22).

Decedent was forty-nine years old at the time of his death (TR 1-97). He was a graduate of the Wharton School of Finance, and at the time of his death was comptroller of the eastern sales region of the Hewlett Packard Corporation (TR 1-24, 26).

The decedent had suffered from ulcerative colitis for about ten years prior to his death (TR 1-29, 31). The condition grew progressively worse (TR 1-32).

In April of 1978 the decedent and his wife consulted a medical doctor in the State of California (TR 1-33). The physician strongly advised a complete colostomy and iliostomy, which involves the complete removal of the large intestine of the lower bowel, an incision in the stomach area, and the attachment of an exterior bag to collect the excretant (sic) (TR 1-33, 34).

Plaintiff and decedent were reluctant to submit to such a radical treatment (TR 1-34). Because of such reluctance, and because of the progressive nature of the disease and the danger of cancer if the disease progressed unchecked, they began to explore alternative treatment options (TR 1-35).

Friends at work introduced decedent to the concept of natural health hygiene, rest, natural foods, and fasting. The decedent, always a voracious reader, read some ten to twelve books on the subject (TR 1-35-38).

The decedent telephoned the Shelton Health School in San Antonio, Texas, for further information (TR 1-40).

After they concluded their research, decedent and his wife decided that he should enter the Shelton Health School for a fast (TR 1-95, 96). They well knew that the Shelton Health School was not operated by medical doctors and was not a hospital. They knew that drugs, surgery, and equipment were contrary to the philosophy of the Health School (TR 1-81).

They discussed this proposed course of action with their medical physician in California. The doctor advised against a fast, stating that such a treatment could result in chemical imbalances in the body. In the face of this advice, the decedent and his wife persisted in their decision to place the decedent in the Health School for a fasting treatment (TR 1-96). Decedent was a determined individual who made his own decisions, regardless of the doctors (TR 1-100, 3-722).

The decedent checked into the Health School and began his fast on or about September 11 or 12, 1978 (TR 3-794, 4-902). He was visited every day by either Dr. Vetrano or Dr. Chapman (TR 4-903). Upon admission Dr. Vetrano took the decedent's history, and over the course of his visit she performed a physical examination of the decedent (TR 4-905-913).

A Mr. Emmett Freez shared a room with the decedent and testified that the decedent appeared to be well and enthusiastic about the fast

at least until Mr. Freez left the Health School on or about October 1, 1978 (TR 3, 716-728). Dr. Vetrano confirmed that decedent did not appear to be having any particular problems (TR 4-913).

On September 28 the decedent had a fainting spell. Dr. Vetrano attempted to persuade decedent to break the fast, but the decedent refused (TR 3-797, 798). Mr. Freez confirmed this advice and refusal. The decedent stated to Mr. Freez:

> "I am sure this is my best chance . . . **I am determined to do or die.**"
>
> (Emphasis supplied.)
> (TR 3-724)

The decedent was a determined person and was disgruntled that Dr. Vetrano suggested a shorter fast (TR 1-100, TR 3-722, 723). He stated to Mr. Freez:

> "I am determined to see this thing through . . . This is my best bet in my best judgment . . . I am going to do or die."
>
> (TR 3-741)

On or about October 7th the decedent complained of a little pain in his chest. Dr. Vetrano broke his fast and gave him nourishment the following day (TR 3-796, 799).

On October 10, 1978 the decedent's pain appeared to be getting worse. Dr. Vetrano called Dr. Fernandez, a medical doctor to whom she was referred by a surgeon of her acquaintance, and arranged for the decedent to be admitted to a hospital (TR 3-802).

Dr. Vetrano brought the decedent to the hospital at 2:44 p.m. and stayed with him until the doctors showed up around 7:00 p.m. (TR 3-795, 801). The doctors stayed for about five minutes and left (TR 3-802). The man died of a heart attack in the hospital the following day (TR 4-967, TR 3-795).

Dr. Vetrano is and was at all material times a chiropractor licensed by the State of Texas (TR 3-790). She holds a Bachelor of Science degree from Trinity University in San Antonio and is an honors graduate of the Texas Chiropractic College (TR 3-971). Over her seventeen years of experience she has conducted supervised fasts for twelve thousand to fifteen thousand people (TR 3-792).

The District Court, over objection, admitted evidence concerning prior, unrelated deaths connected to the Shelton Health School (TR 2-348, 369, 376, 382, 394, 398, 399, 400, 400-423).

Dr. Shelton was bedridden with Parkinson's disease at all material times. He never had any contact with the decedent or his wife.[1]

The essence of this tragic story is that a seriously ill man, understandably anxious to avoid major irreversible surgery, *chose* to pursue an unorthodox mode of treatment. He was an intelligent, educated man, who made his choice based upon his own independent research and investigation. He consulted his own medical physician and persisted in his decision in spite of his doctor's advice.

He chose the Shelton Health School with full knowledge that it was not a medical facility operated by medical doctors, and that the care did not include drugs, chemicals, chemical analysis, and equipment ordinarily associated with hospitals and doctors.

Once he began his fast, he persisted in the fast in spite of Dr. Vetrano's entreaties to break his fast.

When his condition turned for the worse, Dr. Vetrano immediately called in medical assistance, transported him to the hospital, and stayed with him until the doctors arrived, some four hours later.

[1]The liability of Dr. Shelton, if any, is vicarious.

The Opinion below clearly indicates that the Court of Appeals did not correctly perceive the nature of this case. The Court incorrectly states that the Shelton Health School is a "medical facility," and that Dr. Vetrano recommended an extended fast for the treatment of Carlton's condition. (Opinion P. 1330, 1331).

The record reflects that the Shelton Health School was not, and was not represented to be a medical facility, and that Dr. Vetrano did not recommend a course of treatment for ulcerative colitis.

The essence of the Opinion of the Court of Appeals appears to be that the Defendants were negligent in prescribing fasting as a treatment for ulcerative colitis, in administering nothing but distilled water, and failing to medically monitor the condition of the deceased.

The correct posture of the case is that Defendants did not prescribe fasting as the proper treatment, and the deceased *chose* this treatment based upon independent investigation in the face of conventional medical advice. He *chose* to enter a non-medical facility without testing and monitoring equipment. He *chose* to do or die.

PROCEEDINGS BEFORE THE DISTRICT COURT

Trial was before a jury in the District Court, which entered a Judgment based upon the verdict, which is included herein as Appendix A-1.

PROCEEDINGS BEFORE THE FIFTH CIRCUIT

This case was submitted on briefs and oral arguments before a three judge panel, which entered Judgment in accordance with its Opinion (Appendix B).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals Has Rendered a Decision In Conflict with Applicable State Law.

II.

The Court of Appeals Has Rendered a Decision In Conflict With The Federal Rules of Evidence.

III.

The Court of Appeals Has Rendered a Decision Which Will Inhibit Freedom of Choice, Research, and Exploration.

I. The Court of Appeals Has Rendered a Decision In Conflict With Applicable State Law.

Petitioners are not unmindful of the gargantuan caseload of this Court and its awesome responsibility to the Nation in cases of the gravest national significance. Petitioners are further cognizant of the Court's increasing reluctance to grant certiorari to correct errors of the inferior federal courts in matters of local law.

It will doubtlessly be argued by Respondent that this Court should not accept this case because no substantial federal question is presented. The crowded dockets of this Court and the Courts of Appeal perhaps suggest a re-examination of the wisdom and necessity of jurisdiction in the federal courts based upon diversity of citizenship. Nonetheless, as long as the diversity jurisdiction constitutes an integral part of the jurisprudence of our federal system, a case and controversy arising under *28 USC §1332(a)* should be of the same dignity before this Court as one arising under the laws of the United States.

It is respectfully pointed out that the Petitioners before this Court, Defendants below, did not choose the federal forum for this litigation. Inasmuch as the Respondent, Plaintiff below, chose the federal forum, she should not be heard to complain of thorough and effective

federal appellate review on the ground that the case may turn on a point of state law.

The record will not support a judgment of negligence, either ordinary or gross, under Texas law. It is conclusively established by the Plaintiff's testimony that the decision by the decedent to undergo a fast at the Shelton Health School was based upon his independent research and investigation. It is further conclusively established by her testimony that he persisted in this course of conduct in the fact of the contrary advice of his own physician. The Court is presented with a picture of an intelligent, educated, mature businessman, determined to avoid radical, irreversible surgery, which would be accompanied by unpleasant and annoying side effects for the remainder of his life.

He had been suffering from this condition for about ten years. The disease was getting progressively worse. His choices were:

1. Continue with drug treatment that was obviously not working and risk cancer; or,
2. undergo radical surgery; or,
3. explore alternative theories.

On the basis of independent research the decedent made a reasoned choice to undergo a fast at the Shelton Health School in San Antonio.

Plaintiff's testimony conclusively establishes that decedent knew exactly what kind of facility he was entering. He knew he was not entering a hospital operated by doctors with drugs and medical equipment readily available.

The Health School never claimed to be a medical facility:

> "A Health School is not a hospital; it is not a clinic; it is not a sanatorium; it is not an institution dedicated to the cure of disease. It administers no drugs; it employees no treatments; it relies on no antivital factors for the restoration of health."
>
> (Plaintiff's Exhibit No. 2).

Thus, the decedent and his wife well knew that he was not checking into some institution such as the Mayo Clinic, with doctors, laboratories, diagnostic and other equipment.

After he entered the school and commenced his fast, he persisted in the fast over the objections of Dr. Vetrano. From the transcript:

"Q. Now, after the 28th, did you again advise him to break the fast?

"A. Yes. I continued advising him. I told him it was best to break his fast, he should break his fast. I kept trying to get him to break his fast. He didn't want to.

"Q. Did he eventually break the fast?

"A. Well, on October 8 is when I sent him up some watermelon and he said he had pain in his chest."

(TR 3-799).

The testimony that the decedent persisted in his fast over the objection of Dr. Vetrano is corroborated by the disinterested witness, Freez:

"Q. But Mr. Carlton did tell you that he was not going to break the fast against doctor's orders?

"A. I don't know that he used those words, but he was—well, he sort of did, too, yes. He came in the last time, I heard him speak of it, he groused about it once or twice you know. I thought, well, you know, I sort of calmed him down but this one time he seemed a little bit put out because Dr. Vetrano wanted to break his fast and he says, you know, he says, 'This is my best bet, in my judgment,' and he said, 'I am going to do or die.' "

(TR 3-741).

Thus, it is established, corroborated, and uncontested that the decedent persisted in his fast in spite of the expressed and repeated admonishments of Dr. Vetrano.

It is further established and uncontroverted that the decedent never requested any medical assistance.

It was Dr. Vetrano, and only Dr. Vetrano, who telephoned the doctors and brought the man to the hospital, some four hours before the doctors saw fit to arrive.

What is the act or omission on the part of Dr. Vetrano which constitutes negligence? The Court's charge and the jury verdict are not particularly illuminating on this issue.[1] We are told only that the negligence of Dr. Vetrano in some way caused the death of Mr. Carlton. Thus, we must look to the evidence to attempt to discern any act or omission of negligence.

The first possibility is that pursuing this course—i.e.—fasting, would constitute negligence. In some jurisdictions any variance from the accepted mode of treatment upheld by a consensus of opinon among the members of the medical profession renders the physician liable. *Jackson v. Burnham*, 20 Colo. 532, 39 P. 577 (1895); *Allen v. Voje*, 114 Wis. 1, 89 N.W. 924 (1902).

In other jurisdictions, the mode of treatment must have the support of a respectable minority or a considerable number of physicians. *Leech v. Bralliar*, 275 F.Supp. 897 (D.Ariz. 1967); *McHugh v. Audet*, 72 F.Supp. 394 (M.D.Pa. 1947).

In other jurisdictions there must be at least a reasonable disagreement in the medical community. *Snyder v. St. Louis Southwestern Ry. Co.*, 228 Mo.App. 626, 72 S.W.2d 504 (1934).

[1]Appendix A-2.

II

It is clear from the testimony of the medical doctors presented by Plaintiff that they share the almost universal disdain in which alternative health care practitioners are held by the medical community. They indicated that fasting is an improper procedure.

The Supreme Court of Texas considered the question of acceptance of a mode of treatment by the medical establishment in *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977). The Court, per Justice Sam D. Johnson, carefully reviewed the authorities embracing the "any variance," "respectable minority," and "reasonable division" tests discussed above, and rejected all of them. Thus, in Texas, the use of a mode of treatment which is not accepted by the medical community is not negligence in and of itself.

Moreover, the defendants are not medical doctors and cannot be held to the standard of medical doctors.

Finally, the Plaintiff well knew he was opting for a nonmedical course, and he made a reasoned choice.

Thus, the use of fasting in and of itself cannot be the basis of negligence. The question then becomes whether or not there was negligence in Dr. Vetrano's implementation of the technique.

Again, what are the acts or omissions? She took a history, performed a physical examination, saw the man on a regular basis, and regularly took his pulse, blood pressure, and temperature (TR 4-903, 905-913, 916, 921, 3-771, 3-795, 3-841).

There is one thing that Plaintiff's medical witnesses suggested should have been done which Dr. Vetrano did not do, that is, blood testing and chemical analysis. But again, Dr. Vetrano is not a medical doctor and cannot be held to the standard of a medical doctor. Moreover, when the decedent *chose* the Health School over a medical facility with doctors and laboratories, he knew he was opting for natural hygiene over medical analysis and treatment. Thus, the failure to perform chemical blood analysis cannot be the basis for negligence in this case.

The Defendants are not medical doctors and cannot be held to the standards of medical doctors *Nicodeme v. Bailey*, 243 S.W. 2d 397 (Tex. Civ. App.—El Paso, 1951, ref. n.r.e.) A Plaintiff has no cause of action for malpractice, either in diagnosis or recognized treatment, unless he proves by a practitioner of the same school of practice as the Defendant that the diagnosis or treatment complained of was such as to constitute negligence and that it was a proximate cause of the Plaintiff's injuries. *Levermann v. Cartall*, 393 S.W. 2d 931 (Tex. Civ. App.—San Antonio, 1965, Ref. n.r.e.); *Ethicon, Inc. v. Parten*, 520 S.W. 2d 527 (Tex. Civ. App.—Houston (14th Dist.) 1975, no writ); *Ross v. Sher*, 483 S.W. 2d 297 (Tex. Civ. App.—Houston (14th Dist.) 1972, Ref. n.r.e.)

Applying these principles to the case at bar we see that the only practitioner of the same school as that of the Defendants presented by the Plaintiff was Dr. Downing (TR 291-318). A careful reading of Dr. Downing's testimony reveals that at no time did he point to any act or omission of Dr. Vetrano as negligence. The only time Dr. Downing expressed an opinion indicating that conduct would be beneath the standard is in his exchange with the Court on page 317 of Volume 2 of the transcript. In response to a direct question from the Court, Dr. Downing responds that it would be beneath the standard to recommend a diet of distilled water for the treatment of ulcerative colitis.

It must be here remembered that Dr. Vetrano did not recommend the diet for the treatment of ulcerative colitis. Mr. Carlton did not walk in off the street and ask for a diagnosis and recommended treatment. His ailment has been diagnosed and treated in California prior to any involvement with Dr. Vetrano. He decided upon the fasting diet based upon his independent research in consultation with his medical doctor prior to meeting Dr. Vetrano. Thus, there is no competent evidence that Dr. Vetrano was guilty of any act or omission constituting negligence.

Gross Negligence

In Texas, gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it. *Missouri Pacific Ry. v. Shuford*, 10 S.W. 408 (Tex. 1888); *Atlas Chemical Industries, Inc. v. Anderson*, 524 S.W. 2d 681 (Tex. 1975); *Burk Royalty Co. v. Walls*, 616 S.W. 2d 911 (Tex. 1981).

Thus, the record must reflect *such an entire want of care* as to indicate conscious indifference to safety to support findings of gross negligence. From the Opinon in *Burk Royalty Co. v. Walls:*

> "The essence of gross negligence is not the neglect which must, of course, exist. What lifts ordinary negligence into gross negligence is the mental attitude of the defendant; that is what justifies the penal nature of the imposition of exemplary damages. The Plaintiff must show that the Defendant was consciously, i.e., knowingly, indifferent to his rights, welfare and safety. In other words, the Plaintiff must show that the Defendant knew about the peril, *but his acts or omissions demonstrated that he did not care.*"
>
> (At P. 922, Emphasis Supplied).

Thus, there must be such an entire want to care as to indicate that the Defendant did not care!

The question then becomes whether or not this record fairly supports the proposition that Dr. Vetrano *did not care* what happened to this man. It must be remembered that she:

(1) visited and examined him on a regular basis; and

(2) attempted to persuade him to break his fast; and

(3) called in the medical doctors; and

(4) transported him to the hospital; and

(5) stayed with him some four hours until the medical doctors arrived.

No fair reading of this Transcript will support the proposition that Dr. Vetrano did not care what happened to this unfortunate man.

But, the Appellee will no doubt respond, "any care" or "some care" is no longer sufficient to refute gross negligence, as the Supreme Court in *Burk Royalty Co. v. Walls*, supra, specifically disapproved and overruled *Sheffield Division, Armco Steel Corp. v. Jones*, 376 S.W. 2d 825 (Tex. 1965) and it's progeny.

The problem with the "some care", or "any care" analysis is succinctly stated in the majority Opinion at P. 921. The Court offers the example that gross negligence would be defeated in any automobile case if the driver had both hands on the wheel under the *Sheffield Rule*. Thus, the reviewing Court must look to all of the surrounding facts, circumstances, and conditions, not just individual elements or facts.

Applying the teaching of *Burk Royalty Co. v. Walls* to the instant case yields the following conclusion:

Any care, no matter how slight, on the part of Dr. Vetrano will not rebut the jury finding of gross negligence. But all of surrounding facts, circumstances, and conditions disclosed by this record indicate a course of conduct on the part of Dr. Vetrano that is totally inconsistent with the proposition that she did not care what happened to Mr. Carlton. As is succinctly stated in the concurring Opinion of Chief Justice Greenhill in *Burk*, supra:

> "The bottom line, as I read the cases, is the state of mind of the Defendant . . ."
>
> (At P. 926)

The bottom line of this issue in this case is that, regardless of the scientific validity or invalidity of Dr. Vetrano's theories and practices, her every action indicated a commitment to the care of her guests.

It is clear that the Court of Appeals has incorrectly perceived the nature of this case. First, the Court incorrectly identifies the Shelton Health School as a "medical facility". (Opinion Pg. 1330). It is clear from Plaintiffs' Exhibit No. 2, supra, that it was not a medical facility, did not claim to be a medical facility, and in fact affirmatively stated that it was not a medical facility.

Second, the Court declares:

"Dr. Vetrano recommended an extended fast for the treatment of Carlton's condition, urged him to quit taking the medication prescribed for Carlton by his doctors, and enrolled Carlton in the Shelton Health School's fasting program."

As has been noted, Dr. Vetrano never *recommended* a fasting program for the treatment of Carlton's disease. Carlton made that decision in California, upon independent research and investigation, after consultation with his physicians.

Thus the focus of the Fifth Circuit appears to be misplaced. It appears that the essential inquiry of concern to the Court was:

Was it negligence to recommend an extended fast for the treatment of decedent's ulcerative colitis?

Under the facts of this case Petitioners respectfully submit that the appropriate inquiry should be:

Was it actionable negligence to admit decedent to the fasting program which he was determined to pursue?

Inasmuch as decedent was fully informed concerning all aspects of this course of treatment, through his own research and his medical physician, the answer to the appropriate inquiry is necessarily negative.

Furthermore, Dr. Vetrano attemped to persuade Mr. Carlton to break his fast. The Court of Appeals notes that:

> "Furthermore while she testified that she attempted to have the decedent break his fast, there was no record in her notes of such advice."
>
> (Opinion Pg. 1332)

The Opinion totally ignores the clear, unequivocal testimony of the disinterested witness, Freez, that Carlton related that Dr. Vetrano attempted to break his fast, but that he was determined to do or die.

Thus it is clear that the decision to embark upon the fast was that of Mr. Carlton, against the advice of his medical physician. The decision to continue the fast was that of Mr. Carlton, against the advice of Dr. Vetrano.

II. The Court of Appeals Has Rendered A Decision In Conflict With The Federal Rules of Evidence.

The District Court, over objection, admitted evidence concerning prior, unrelated deaths connected to the Shelton Health School (TR 2-348, 369, 376, 382, 397, 398, 399, 400, 400-423).

Evidence of similar but unrelated acts or omissions on other occasions is inadmissible on the issue of whether or not a party has been negligent in doing, or not doing a particular thing. *Rules 403, 404(b) Federal Rules of Evidence.* See also *Missouri K & T Ry Co. v. Johnson*, 485 S.W. 568 (Tex. 1989); *Dallas Ry. & Terminal Co. v. Industries*, 604 S.W. 2d 341 (Tex. Civ. App.—Texarkana, 1980, no writ); *Reynolds & Huff v. White*, 378 S.W. 2d 923 (Tex. Civ. App.—Tyler, 1964, no writ).

On page 382 of Volume 2 of the Transcript, the Court admits the testimony that the witness has autopsied eight deaths from the Shelton Health School in about fifteen years. Obviously this is highly prejudicial and inflammatory. There is not even a scintilla of evidence that these eight deaths were connected to or related to the case at bar. See *Green v. Evans*, 362 S.W. 2d 377 (Tex. Civ. App.—Dallas, 1962, no writ).

The Court next permitted testimony concerning the deaths of Armand John Gilbert, Keith V. Ellis, and Joy Michelle Bristo (TR 2-399). The witness testified that all three died of ". . . their disease, starvation, dehydration." (TR 2-407). The witness is testifying from autopsy reports and tissue slides. (P. 405)

The witness also testified that all three came from the Shelton Health School.

The obvious purpose of this tender is to persuade the jury that if three people died from the same disease, and all three had been at the Shelton Health School, it necessarily follows that the Health School caused the death of all three, and Mr. Carlton as well.

The problem is that the Plaintiff has not demonstrated a degree of substantial similarity of circumstances as to render such prior unrelated deaths admissable. The Plaintiff did not demonstrate, for example, the condition of the three persons upon admission to the Health School, the length of their stay or the course of treatment at the Health School. The Plaintiff has merely selected three random deaths, over a five year period where the cause of death is the same.

Nor are these prior deaths admissible under some theory of intent, scheme, or design. It is not alleged that the death in the case at bar was the result of an intentional act. This tender is offered purely and simply to prove an act of negligence in 1978 by showing specific incidents in 1973, 1974, and 1977).

The District Court's theory of admissibility is to show knowledge, intent, nature, and understanding pursuant to *Rule 404(b), Federal Rules of Evidence* (TR 2-398).

The proper interpretation and application of *Rule 404(b)* is illustrated by the Opinion of the Court in *Garcia v. Aetna Casualty & Surety Co.*, 657 F. 2d 652 (5th Cir 1981). In *Garcia*, a suit on a fire insurance policy, the Defendant insurer introduced evidence that approximately one year before the fire another building leased by Plaintiff had burned. There was also evidence that the Plaintiff was in financial straits

and that a relative of Plaintiff had set the recent fire. This Court reversed the Judgment of the District Court, squarely holding that the prior fire was inadmissible.

The Court was confronted with a similar question in *Smith v. State Farm Fire and Casualty Co.*, 633 F. 2d 401 (5th Cir. 1980). In this case there was not one, but *five* prior fires. The Court again held the prior fires to be inadmissible.

It is clear that the deaths in the instant case, like the fires in *Garcia* and *Smith*, supra, do not meet the standards of *Rule 404(b) Federal Rules of Evidence* or the limitations of *Rule 403, Federal Rules of Evidence*.

It is respectfully submitted that the reliance of the Court of Appeals on *Ramos v. Liberty Mutual Insurance Co.*, 615 F. 2d 334 is misplaced. The vital distinction is that *Ramos* and it's predecessors are products liability cases, wherein the focus is on the physical strengths, weaknesses, and defects of products. *Rule 404(b) Federal Rules of Evidence* is addressed to other *acts* to prove character to prove conduct in a specific instance. Thus, the focus of *Rule 404(b)* is conduct of a person, not the physical properties of a product. *Garcia v. Aetna Casualty & Surely Co.* and *Smith v. State Farm Fire and Casualty Co.*, supra, also involved conduct and excluded the extraneous acts.

III. The Court of Appeals Has Rendered A Decision Which Will Inhibit Freedom of Choice, Research and Exploration

With deference and respect Petitioners suggest that the real basis of the judgments of the Courts below may well be a disdain for the practice of "fasting" as a treatment for physical illness. It is certainly true that such practices have not been largely accepted by the medical community or the population at large.

Although the Court holds that it is not holding the Petitioners to the standards of medical doctors, a careful analysis of the Opinion suggests that the Court is in reality comparing fasting practice with medical care, and is plainly appalled at the perceived difference. For example,

the Court describes the Shelton Health School as a "medical facility" and is offended that the decedent's vital signs were not monitored and recorded on a daily basis and blood or urine samples were never tested. (Opinion Pgs. 1330, 1332)

As has been noted, the Court incorrectly faults Dr. Vetrano for recommending a fast for the treatment of ulcerative colitis. (Opinion Pg. 1331) The Court criticizes Dr. Vetrano for administering only distilled water without vitamins or food suppplements. (Opinion Pg. 1332)

It may be true that the theories and practices of the Petitioners have no basis in biology, physics, psychology, parapsychology or any other scientific discipline. Or, it may be that the intelligence of a future day will perceive the vision of the present as myopic and the theories of the Petitioners will be enshrined orthodoxy.

Petitioners submit that the Federal Courts are not the appropriate forum to debate such matters. In the case at bar a mature, educated, intelligent person, chose to embark on an unaccepted and perhaps experimental form of treatment. He chose to risk his life, rather than live with the available alternatives. Such was his right.

CONCLUSION

Because the resolution of the serious questions raised by the Courts below is important to the proper functioning of the Federal Courts:

We respectfully submit that the Court should grant Petitioners' prayer for a Writ of Certiorari.

Respectfully submitted,

THOMAS GOGGAN
416 Littlefield Building
Austin, Texas 78701
(512) 477-9412

Counsel of Record

By: Thomas Goggan
THOMAS GOGGAN

CERTIFICATE OF SERVICE

This is to certify that a ture copy of the foregoing Petition For A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit was this 2nd day of April, 1984, forwarded to the following attorney of record, Mr. Dennis Bujnoch, 1900 NBC Building, San Antonio, Texas, 78205, by U.S. Mail, certified, return receipt requested.

Thomas Goggan

THOMAS GOGGAN

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOAN F. CARLTON, INDIVIDUALLY and as representative of the Estate of WILLIAM R. CARLTON, Deceased, and as Next Friend of ROBERT CARLTON, MELISSA CARLTON, DAVID CARLTON and LYNNE CARLTON,	§	CIVIL ACTION NO. SA-80-CA-454
Plaintiffs	§	
VS.	§	
DR. HERBERT M. SHELTON, Individually and d/b/a DR. SHELTON'S HEALTH SCHOOL and DR. VIVIAN V. VETRANO	§	

JUDGMENT

The above entitled and numbered cause came on regularly for trial on September 8, 1982. Plaintiffs, JOAN F. CARLTON, Individually and as Representative of the Estate of WILLIAM R. CARLTON, Deceased, and as Next Friend of ROBERT CARLTON, MELISSA CARLTON, DAVID CARLTON and LYNNE CARLTON and Defendants DR. HERBERT M. SHELTON, Individually and d/b/a DR. SHELTON'S HEALTH SCHOOL and DR. VIVIAN V. VETRANO appeared in person and by their attorneys. A jury of six

persons and two alternates was duly accepted, impaneled and sworn to try the action.

After hearing the evidence, arguments of counsel, and instructions of the court, the special issues were submitted to the jury. On September 17, 1982, the jury returned a special verdict. On that basis, therefore, the Court is of the opinion that, on the merits, judgment should be rendered in favor of the Plaintiffs.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

(1) That Plaintiffs have judgment jointly and severally against the Defendants DR. HERBERT M. SHELTON and DR VIVIAN V. VETRANO and recover damages in the following amounts and in the following capacities:

(a) JOAN F. CARLTON the sum of EIGHT HUNDRED TWENTY FIVE THOUSAND ($825,000.00) DOLLARS with interest thereon at the rate of nine percent (9%) per annum from date of rendition of judgment until paid;

(b) LYNN CARLTON the sum of TWELVE THOUSAND ($12,000.00) DOLLARS with interest thereon at the rate of nine percent (9%) per annum from date of rendition of judgment until paid;

(c) ROBERT CARLTON the sum of TWELVE THOUSAND ($12,000.00) DOLLARS with interest thereon at the rate of nine percent (9%) per annum from date of rendition of judgment until paid;

(d) Joan F. Carlton as Next Friend of DAVID CARLTON the sum of TWELVE THOUSAND ($12,000.00) DOLLARS with interest thereon at the rate of nine percent (9%) per annum from date of rendition of judgment until paid;

(2) That all costs of this suit be taxed against the Defendants jointly and severally.

SIGNED and ENTERED on this _____ day of _____, 1982.

FRED SHANNON
U.S. District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOAN F. CARLTON, et al	§	
Plaintiffs,	§	
DR HERBERT M. SHELTON, et al	§	CIVIL ACTION NO. SA-80-CA454
DEFENDANTS	§	

VERDICT FORM

QUESTION NO. 1.

Do you find from a preponderance of the evidence that the negligence of Defendant Vetrano, if any, proximately caused the death of Mr. Carlton?

You are instructed that "negligence" is the failure to use reasonable care. "Reasonable care" is that degree of care which a reasonably careful person would use under the same or similar circumstances. Negligence may consist either in doing something that a reasonably careful person would do under like circumstances.

"Proximate cause" is that cause which in a natural and continuance sequence produces a result, which results would not have occurred but for the cause at issue. In order to be a proximate cause, the result or some similar result must have been reasonably foreseeable to a reasonably prudent person under the same or similar circumstances

Answer, "We do" or "We do not".

We, the Jury, answer "We do".

If you answer No. 1 "We do", then answer 1-A, otherwise do not answer 1-A.

QUESTION NO. 1-A.

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate each of the following Plaintiffs for their damages, if any, which you find from a preponderance of the evidence resulted from the conduct of Defendant Vetrano inquired about in Question No. 1?

Answer separately as to each Plaintiff in dollars and cents, if any.

(a) Joan F. Carlton;

You may consider the present value of care, maintenance, support, services, advice, counsel, and contributions of pecuniary value that she would in reasonable probability have received from Mr. Carlton during his lifetime had he lived.

You may also consider her loss of consortium, that is, her loss of the affection, society, sexual relations, companionship and emotional support of Mr. Carlton.

We the jury, answer 800,000.00

(b) Estate of William R. Carlton:

You may consider reasonable funeral and burial expenses which would be suitable to his station in life.

You may also consider Mr. Carlton's conscious physical pain, if any, and mental anguish, if any, suffered before his death.

We, the Jury, answer none.

(c) With regard to the children of Mr. Carlton, you may consider the present value of care, maintenace, support, services, education, advice, counsel, and contributions of pecuniary value that each child would have received in reasonable probability from Mr. Carlton during his lifetime had he lived. Answer separately as to each child.

Lynn Carlton 12,000.00
Robert Carlton 12,000.00
David Carlton 12,000.00
Melissa Carlton 12,000.00

If you have answered Question No. 1 "We do", then answer the following question; otherwise do not answer the following question.

QUESTION NO. 2

Do you find from a preponderance of the evidence that the conduct of Defendant Vetrano inquired about in Question No. 1 amounted to gross negligence?

"Gross negligence" means a wanton or reckless disregard for the welfare of others.

Answer "We do" or "We do not".

We, the Jury, answer: We do.

If you have answered Question No. 2 "We do", then answer the following question; otherwise do not answer the following question.

QUESTION NO. 2-A

What sum of money do you find from a preponderance of the evidence should be awarded to Plaintiffs against Defendant Vetrano as exemplary damages for the death of Mr. Carlton?

"Exemplary damages" means an amount which you may in your discretion award as an example to others or as a penalty or by way of punishment in addition to any amount you may have awarded as actual damages.

Answer in dollars and cents, if any.

We, the Jury, answer: 25,000.00

If you answered Question No. 1 "We do", then answer Question No. 3, otherwise do not answer Question No. 3.

QUESTION NO. 3

Do you find from a preponderance of the evidence that Defendant Vetrano was employed in a managerial capacity by Defendant Shelton and was acting within the scope of such employment in the supervision of Mr. Carlton's fast?

Answer "We do" or "We do not."

We, the Jury, answer: We do.

DATE	FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOAN F. CARLTON, Individually and as Representative of the Estate of WILLIAM R. CARLTON, Deceased, and as Next Friend of ROBERT CARLTON, MELISSA CARLTON, DAVID CARLTON and LYNNE CARLTON,	§	CIVIL ACTION NO. SA-80-CA-454
Plaintiffs	§	
VS.	§	
DR. HERBERT M. SHELTON, Individually and d/b/a DR. SHELTON'S HEALTH SCHOOL and DR. VIVIAN V. VETRANO	§	

ORDER

On the 26 day of October, 1982, came on for consideration the Defendants' DR HERBERT M. SHELTON'S Motion for New Trial and DR. VIVIAN V. VETRANO'S Motion for New Trial and the Court having read the pleadings is of the opinion that both motions should be in all things overruled.

It is THEREFORE, ORDERED, AJUDGED AND DECREED that the Motion for New Trial filed by Defendant DR. HERBERT M. SHELTON and the Motion for New Trial filed by DR. VIVIAN

V. VETRANO are both hereby in all things OVERRULED and that the Judgment of this Court entered on September 30, 1982 is in all things FINAL.

SIGNED and ENTERED on the 26 day of October, 1982.

_____

JUDGE PRESIDING

APPENDIX B

OPINION

B(1)

Joan F. CARLTON, Individually and as representative of the estate of William R. Carlton, deceased, and as next friend of Robert Carlton, et al., Plaintiffs-Appellees,

v.

Dr. Herbert M. SHELTON, Individually and d/b/a Dr. Shelton's Health School, and Dr. Virginia V. Vetrano, Defendants-Appellants.

No. 82-1659

United States Court of Appeals,
Fifth Circuit.

Jan. 3, 1984.

Widow brought action against "fasting practitioner" and facility operated by such practitioner, arising from death of husband following such practitioners care of husband during extended fast recommended by such practitioner for treatment of husband's ulcerative colitis. The United States District Court for the Western District of Texas, Fred Shannon, J., entered judgment on jury verdict in favor of widow, and defendants appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) evidence was sufficient to support jury's findings of negligence and gross negligence, and (2) district court did not err by admitting evidence of similar, prior deaths at facility.

Affirmed.

1. Federal Courts 847

If state of proof is such that reasonable and impartial minds could reach conclusion expressed in jury's verdict, Court of Appeals must not disturb jury's findings on appeal.

2. Physicians and Surgeons 18.80(2)

Evidence in action against "fasting practitioner" arising from death of plaintiff's decedent following such practitioner's care of decedent

during extended fast recommended by such practitioner for treatment of decedent's ulcerative colitis was sufficient to support conclusion of negligence and gross negligence on part of such practitioner.

3. Federal Courts 630

Federal district court's definition of gross negligence as "a wanton or reckless disregard of others" did not constitute plain error.

4. Physicians and Surgeons 18.70

Federal district court in action against "fasting practitioner" arising from death of plaintiff's decedent during extended fast recommended by such practitioner for treatment of decedent's ulcerative colitis did not improperly admit evidence that such practitioner previously had supervised three people who died from malnutrition and dehydration while engaged in similar fasts, and admission of such evidence did not constitute "unfair prejudice."

Appeals from the United States District Court for the Western District of Texas.

Before POLITZ, JOHNSON and WILLIAMS, Circuit Judges.

JOHNSON, Circuit Judge:

Appellants Herbert M. Shelton and Vivian V. Vetrano are chiropractors operating the Shelton Health School in San Antonio, Texas. The Shelton Health School is a "medical facility" that, among other things, encourages the practice of extended fasting for the treatment of numerous illnesses. On September 11, 1978, forty-nine year old William R. Carlton checked into the Shelton Health School in an attempt to obtain relief from a condition known as ulcerative colitis, a nagging disorder of the colon.[1] Upon admittance, Carlton weighed approximately 192 pounds and was, other than for ulcerative colitis, in good physical condition. Twenty-nine days later, Carlton died of

[1] While not uncommon, ulcerative colitis is a condition the cause of which remains unknown to modern medicine. *See* Record, vol. 1, at 193. A condition manifested by ulcers in the colon, ulcerative colitis appears more frequently in individuals involved in high stress occupation. *Id.*

severe dehydration, malnutrition, and aspiration pneumonitis.[2] At the time of death, Carlton weighed only 130 pounds.

Carlton's widow, Joan F. Carlton, instituted this action on behalf of herself and the Carltons' four surviving children—Lynn, Robert, Melissa, and David. The Carltons alleged that the appellants were both negligent and grossly negligent in the supervision of the decedent's fast and that William Carlton died as a result of the appellants' negligence and gross negligence. The case was tried to a jury, which found the appellants both negligent and grossly negligent and awarded the Carltons compensatory and punitive damages totalling $873,000. On appeal, appellants argue that there is insufficient evidence to sustain the jury's findings of negligence and gross negligence, and that the district court erred by admitting evidence of prior, similar deaths at the Shelton Health School. There is a plethora of evidence supporting the jury's findings of negligence and gross negligence; the appellants failed to object to the district court's definition of gross negligence; and, the district court did not improperly admit the evidence of previous deaths at the Shelton Health School. Hence, we affirm the district court's judgment.

I. *Facts*

In 1968, the decedent was diagnosed as having ulcerative colitis. While not particularly painful, the condition became quite a nuisance, often requiring the decedent to interrupt his active schedule as a finance and systems manager for Hewlett-Packard as many as eighteen times a day to relieve himself. Unfortunately, the decedent's condition did not respond to the repeated efforts of numerous physicians, and in April of 1978, Carlton's physicians, recommended a complete colostomy, a process requiring surgical removal of the entire colon and construction of an external opening allowing the collection of the patient's excrement in a small plastic bag. Understandably hesitant to submit hastily to such a drastic operation, Carlton and his wife began to investigate alternative treatments.

[2] Basically, aspiration pneumonitis occurs in individuals who have become too weak to gag. As a result, these individuals inhale their own saliva and vomit and are inflicted with bronchial disorders resulting from the inhaled substances.

Carlton was introduced to the concept of extended fasting by a friend at work and decided to pursue this alternative form of treatment prior to submitting to the surgical removal of his colon. Joan Carlton described the decedent's decision to pursue fasting at trial:

> We had been introduced to the natural health hygiene way of thinking and possibility of undertaking a fast to allow the body to rest, cure itself, and we thought that was a viable alternative to the operation because if it didn't work, we could always go ahead with the operation.

Record, vol. 1, at 35.

William Carlton read several books discussing the fasting treatment, and, after reading Dr. Shelton's book—*Fasting Can Save Your Life*—he contacted the Shelton Health School and consulted with Dr. Vetrano. Dr. Vetrano recommended an extended fast for the treatment of Carlton's condition, urged him to quit taking the medication prescribed for Carlton by his doctors, and enrolled Carlton in the Shelton Health School's fasting program. Carlton complied with Dr. Vetrano's advice, checked into the Shelton Health School weighing 192 pounds and, as we have seen, twenty-nine days later and sixty pounds lighter, William Carlton expired shortly after being admitted to Baptist Memorial Hospital in San Antonio, Texas.

II. *Sufficiency of the Evidence*

[1] Initially, appellants allege that there is insufficient evidence to support the jury's findings of negligence and gross negligence. In determining the sufficiency of the evidence, we apply well-settled standards of appellate review. If the state of the proof is such that reasonable and impartial minds could reach the conclusion expressed in the jury's verdict, we must not distrub the jury's findings on appeal. *See Fielder v. Bosshard*, 590 F.2d 105 (5th Cir.1979).

A. *Negligence*

The district court's charge required the jury to determine whether Dr. Vetrano exercised that degree of care which a "reasonably careful person would [have] use[d] under the same or similar circumstances."

The basic "reasonable person" standard was utilized since none of the attorneys at trial could suggest an appropriate standard of care other than the "reasonable person" standard. The degree of care required of medical doctors certainly was not appropriate since neither Dr. Vetrano nor Dr. Shelton held themselves out as medical doctors. Moreover, the degree of care required of chirporactors was not appropriate since the appellants do not appear to have been engaged in their particular treatment of Carlton at the Shelton Health School. Confronted with this dilemma, counsel for the Carltons agreed to submit the issue of the appellants' negligence under the least stringent standard available—the reasonable person standard. *See* Record, vol. 1, at 121. Hence, there is no need for this Court to delve into the quagmire of determining the appropriate standard of care required of a "fasting practitioner." We need only determine whether reasonable and impartial minds could have concluded that Dr. Vetrano failed to exercise that degree of care which a reasonably prudent person would have used under the same or similar circumstances. We have little difficulty concluding that the jury's verdict is supported adequately by the evidence presented at trail.

[2-4] The evidence presented to the jury demonstrated that Dr. Vetrano literally allowed Carlton to starve to death. For twenty-nine days, the decedent was given nothing more than distilled water, usually only two cups of water a day. No vitamins or food supplements were administered and virtually no record of the decedent's progress was kept by Dr. Vetrano. The decedent's vital signs were not monitored and recorded on a daily basis and blood or urine samples were never tested. Indeed the record reflects that Dr. Vetrano would not even see the decedent for as long as four days at a time. Carlton was unable to leave his bed for almost four days before Dr. Vetrano ultimately had him transported to Baptist Memorial Hospital and, upon arrival, the doctors noted that he could not sit up and became completely exhausted by simply moving his hands. Record, vol. 1, at 175, 197, 252, 253, 261. The deteriorated state of Carlton's condition when Dr. Vetrano finally sought competent medical assistance was described by the Bexar County Medical Examiner at trial:

> When he came in he was in a very serious condition, a critical condition. His blood tests revealed that the constituents of his blood were such that he was sort of, I guess you would say, balanced on a knife endge . . . If he had died five minutes after admission I would not have been surprised in the least.

Record, vol. 2, at 419. Suffice it to say that the jury was presented with sufficient evidence to support the conclusion of negligence on the part of Dr. Vetrano.

B. *Gross Negligence*

Appellants also contend that the jury was not presented with sufficient evidence to conclude that Dr. Vetrano's actions constituted gross negligence, defined to the jury as "a wanton or reckless disregard of others."[3] We find sufficient evidence to support the jury's finding. As we shall find in the following section of this opinion, the jury properly was presented with evidence of three prior deaths at the Shelton Health School, which resulted from virtually identical causes. The fact that Dr. Vetrano previously had supervised three people who died from malnutrition and dehydration while engaged in a distilled water fast alone would support the jury's conclusion that Dr. Vetrano displayed a wanton and reckless disregard for the welfare of William Carlton. Certainly, the jury could have concluded that Dr. Vetrano was grossly negligent when she had seen three people waste away and die under substantially similar circumstances.

Dr. Vetrano's lackadaisical efforts to monitor Carlton's condition and her willingness to await the eleventh hour before contacting competent medical assistance also are indicative of her wanton and reckless disregard for Carlton's welfare. Although Dr. Vetrano alleged she

[3] Appellants attack the trial court's definition of "gross negligence" and urge that it is inconsistent with the Texas Supreme Court's decision in *Burk Royalty v. Walls*, 616 S.W.2d 911 (Tex. 1981). However, since the appellants failed to object to the trial court's definition of gross negligence, we refuse to consider the appropriateness of the district court's definition. *See Haupt v. Atwood Oceanics, Inc.* 681 F2d 1058, 1062 (5th Cir.1981). The district court's definition certainly did not constitute plain error. *Id.*

visited the decedent on a regular basis, her notes clearly point to conduct to the contrary. Furthermore, while she testified that she attempted to have the decedent break his fast, there was no record in her notes of such advice. Even Dr. Vetrano's own witness, a "fasting practitioner," testified that the patient must be seen every day, that careful records must be kept, and that it is crucial to make a record of a patient's refusal to break a fast. Record, vol. 3, at 671-73. We "commit our trust to the jurors who saw and heard the witnessess" and refuse to disturb the jury's findings of gross negligence. *Fielder v. Bosshard*, 590 F.2d at 109.

III. *The Evidence of Prior Deaths*

[5] In appellants' final attack upon the district court's judgment, they contend that the district court erred by admitting evidence of similar, prior deaths at the Shelton Health School. Record, vol. 2, at 399-400. We disagree.

During the testimony of Dr. Vincent Di Maio, Bexar County medical Examiner, the autopsy reports of three individuals who had died as the result of extended fasting were admitted. Dr. Di Maio had examined the autoposy reports and had actually examined tissue slides that had been retained by the medical examiner. All three individuals, like William Carlton, had undertaken an extended fast at the Shelton Health School, had sustained extreme weight losses prior to the time of their demise, and had been under the care of Dr. Vetrano. *See* Record, vol. 2, at 8. Dr. Di Maio further testified concerning the similar nature of all four patients' deaths: "All of these people died as a result of dehydration, starvation and they manifested the evidence at autopsy of their disease, starvation, and dehydration." Record, vol. 2, at 407. Based upon the similarity of the conditions, the doctor testified that the individual who supervised the fast had grossly neglected the welfare of all four patients.

This Court has held that evidence of similar events may be relevant to the "defendant's notice, magnitude of the danger involved, [or] the defendant's ability to correct a known [condition] . . . " *See Ramos*

v. Liberty Mutual Insurance Co., 615 F.2d 334-338-39 (5th Cir.1980). We have also emphasized that the trial court generally has broad discretion in the admission of evidence. *Id.* at 340. We do not find error in the district court's admission of the prior deaths.

The evidence presented by Dr. Di Maio demonstrated that the three prior deaths occurred under shockingly similar circumstances and from virtually identical causes. This evidence undoubtedly was probative on the issue of Dr. Vetrano's gross negligence. The evidence proved that she was aware of the grave circumstances in which she had placed Carlton, had knowledge of the probability of death, and repeatedly ignored these patients' need for competent medical assistance. More relevant evidence of her wanton and reckless disregard for the welfare of her patients cannot be fathomed. While the evidence certainly was prejudicial to Dr. Vetrano, its admission did not constitute "unfair prejudice." *See* Fed.R.Evid. 403. The district court did not improperly admit the evidence of the three prior deaths.

IV. *Conclusion*

William R. Carlton died as a result of severe dehydration and malnutrition while under the care of Herbert M. Shelton and Vivial V. Vetrano. An impartial jury concluded that Carlton's death was proximately caused by these individuals' gross negligence and awarded the decedent's wife and surviving children just compensation for their loss. We have seen that the evidence presented to the jury was relevant and admissible and that the jury's verdict is supported by a wealth of evidence. Accordingly, we affirm the district court's judgment in all respects.

AFFIRMED.